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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TROY L. GRAVES,
Petitioner

VS.

VESUVIUS USA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

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ATTORNEYS FOR PETITIONER

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

TROY L. GRAVES	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 96-50621**
	§	
VESUVIUS USA,	§	
Defendant.	§	

ORDER

Came on to be considered the of Defendant's motion for summary judgment and Plaintiff's response thereto. After careful consideration, the Court determines that the Defendant's motion is meritorious and is therefore granted.

I. Background

Plaintiff Troy L. Graves ("Graves") is a former employee of Defendant Vesuvius USA ("Vesuvius"). The Defendant contends that on January 8, 1993, Graves disobeyed a direct order from his supervisor Calvin Bell ("Bell") to return to work and instead left the premises. When he returned to work on January 11, 1993, Plaintiff's employment at Vesuvius was terminated for allegedly failing to follow his supervisor's order.

Graves, however, contends that his termination "was part of a pattern of Vesuvius to open up positions for white employees who had been laid off when Vesuvius shut-down one of its divisions, i.e. 'Viso' division." Plaintiff Graves' Response to Defendant Vesuvius USA's Motion for Summary Judgment at p. 3. Plaintiff, therefore, filed this lawsuit on

August 22, 1995, pursuant to Title VII and Title 28, United States Code, Section 1981, seeking $250,00000 in compensatory and punitive damages and reinstatement to his former position.

II. Discussion

A. Summary Judgment

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." FED.R.Civ.P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the Court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. See id. at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. See id. at 1031; Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists and is not required to resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court that the non-moving party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. See id. at 283.

However, if the movant satisfies his initial responsibility, based on "the pleadings, depositions, answers to

interrogatories and admissions on file, together with affidavits, if any," of an absence of a genuine issue of material fact, and they are entitled to judgment as matter of law, the non-movant must present sufficient summary judgment proof indicating that a material fact is in dispute or that the movant is not entitled to judgment as matter of law. Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552 (1986). By imposing this requirement on the non-movant, Rule 56 isolates and disposes of factually unsupported claims and defenses. Id. at 2553. It is not a disfavored procedural shortcut, but rather "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex, 106 S.Ct. at 2555; FED.R.CIV.P. 1. Thus, summary judgment should be granted when "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the non-movant, or where it is so overwhelming that it mandates judgment in favor of the movant." Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993).

In order to successfully oppose a motion for summary judgment, the non-movant must "designate specific facts showing that there is a genuine issue for trial." Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1307 (5th Cir. 1988); See also, Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989); Franz Chemical Corp. v. Philadelphia Quartz, 594 F.2d 146, 150 (5th Cir. 1979); De Bardeleben v. Cummings, 453 F.2d 320, 324 (5th Cir. 1972). A non-movant does not meet his burden by merely referring to his attached deposition. Id. at 1307. The Court is under no obligation or duty to search the entire record to determine whether a genuine issue of material fact exists. Id. Additionally, when the non-movant relies on affidavits, "it cannot rely on conclusory allegations unsupported by factual detail to create an issue of material fact." Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). Thus, as the Fifth

Circuit emphasized in Topalian v. Ehrman, 954 F.2d 1125, 1137 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992), "[t]he burden to discover a genuine issue of material fact is not on [the] Court." (emphasis added).

B. Racial Discrimination: Title VII[1]

When faced with a claim of employment discrimination under Title VII, the essential issue in the case is whether the defendant intentionally discriminated against the Plaintiff. United States Postal Serv. Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). The burden of proving "intentional discrimination" is at all times on the plaintiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Thus, it is the plaintiff's responsibility to come forth with sufficient evidence to raise an inference that the employer's conduct was racially motivated. Wilson v. Stroh Cos., 952 F.2d 942, 945 (6th Cir. 1992).

A plaintiff may prove intentional discrimination with direct or indirect (inferential) evidence. Davis v. Chevron USA, Inc., 14 F.3d 1082, 1085 (5th Cir. 1994). Direct evidence of discrimination is the exception not the rule. Id. at 1085. Evidence of direct discrimination exists when the employer places a substantial negative reliance on an illegitimate criterion in reaching an employment decision. Id.

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[1] Plaintiff additionally asserts that he was discriminated against in violation of 42 U.S.C. § 1981. The burden of proof in a § 1981 case is the same as in a Title VII action. See Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Dooley v. Ft. Worth Independent School Dist., 686 F. Supp. 1194, 1201 (N.D.Tex. 1987), aff'd, 866 F.2d 418, cert. denied, 490 U.S. 1107 (1989). Therefore, the analysis in the present section applies to Plaintiff's section 1981 claim in addition to his Title VII cause of action.

In the context of employment discrimination cases, "[d]irect evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." Id. at 1085; Brown v. East Miss. Elec. Power Ass'n., 989 F.2d 858, 861 (5th Cir. 1993). Direct evidence of discrimination exists when a terminated employee's supervisor openly and routinely uses racial slurs, Davis, 14 F.3d at 1085, or when one partner refers to the plaintiff as "macho", another suggests that she overcompensates for being a woman, a third tells her to go to charm school, and a fourth advises her to talk more femininely, dress more femininely, and wear more jewelry. Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). These comments are "direct evidence" of discrimination because they cannot be interpreted as anything other than a reflection of bias - either racial or sexual. Davis, 14 F.3d at 1085.[2]

If a plaintiff is unable to prove discrimination with "direct evidence", he may prove discrimination by "inference." A plaintiff may inferentially establish a claim of discrimination by following the test discussed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Burdine, 450 U. S. at 248. The test articulated in these cases sets the procedural mechanisms that govern discrimination cases. Under this test: 1) the plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination; 2) if the plaintiff is successful, the burden shifts to the defendant to articulate a non-discriminatory reason for its decision; and 3) if that is done, the plaintiff may attempt to demonstrate that the defendant's proffered reason(s) is pretextual. St. Mary's Honor Ctr. v. Hicks, 113 S.Ct. 2742, 2747 (1993).

---

[2] The Plaintiff clearly has failed to present the Court with any evidence that could even remotely be characterized as direct evidence.

In order to prove that he was terminated for discriminatory reasons, the plaintiff must generally prove: 1) that he is a member of a protected class; 2) that he was qualified for the job from which he was discharged; 3) he was discharged; and 4) he was replaced by or the position was given to a non-minority. Meinecke v. H & R Block, 66 F.3d 77, 83 (5th Cir. 1995); McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1345-46 (5th Cir. 1985). See generally, Hicks, 113 S.Ct. at 2747 (disparagement treatment case). In cases where the employer does not plan to replace the terminated employee, the Fifth Circuit has indicated that the fourth element is, "more appropriately, that after [the] discharge others who were not members of the protected class remained in similar positions." Meinecke, 66 F.3d at 83 quoting Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990). The plaintiff is, however, still required to provide the district court with some showing of a "causal nexus" between the plaintiff's protected status and the discriminatory action taken. Wilson, 952 F.2d at 945.

In cases involving the alleged violation of work rules, the plaintiff may prove a prima facie case by showing that he did not violate the work rule or that white employees who engaged in similar acts were not punished similarly." Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995). To establish that he was treated differently from white employees, the plaintiff must show that white employees were treated differently under circumstances that were nearly identical to his. Id. at 1090; Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990); David v. Delta Airlines, Inc., 678 F.2d 567, 571-79 (5th Cir. 1982). If the plaintiff is unable to show that the factual situations were substantially similar, he is unable to establish a prima facie case. Mayberry, 55 F.3d at 1090. However, a plaintiff who is unable to establish that white employees were treated differently may still

establish a prima facie case if he can show that he did not violate the work rule for which he was disciplined. Mayberry, 55 F.3d at 1090; Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir.) cert. denied, 449 U.S. 879 (1980).

Once the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the action taken. Hicks, 113 S.Ct. at 2742. The burden is one of production not of persuasion. Id. at 2747. Therefore, the employer is not required to prove the absence of a discriminatory motive. Id. The defendant meets his burden of production if he presents evidence that "if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) quoting Hicks, 113 S.Ct. at 2742.

If the employer satisfies this burden of production, the plaintiff may prevail only if he proves that the employer's stated reasons for his dismissal are merely a "pretext" or "ruse" designed to conceal its discriminatory motive. Davis, 14 F.3d at 1087; See also, Burdine, 450 U.S. at 255. Thus, if the defendant provides the court with sufficient summary judgment proof of a legitimate reason for not promoting or terminating his employment, the burden shifts to the plaintiff to proffer evidence that the decision was "pretextual". Davis, 14 F.3d at 1088. The plaintiff can avoid a motion for summary judgment only "if the evidence as a whole: 1) creates a fact issue as to whether each of the employer's stated reasons for termination were what actually motivated the employer and 2) creates a reasonable inference that race played a determinative factor in the actions of which the plaintiff complains." (emphasis added) Rhodes, 75 F.3d at 993. Summary judgment should, therefore, be granted if the evidence taken as a whole would not allow a jury to infer that the employee was terminated for discriminatory reasons. Id.

at 994. Thus, "if the evidence put forth by the plaintiff to establish a prima facie case and to rebut the employer's reasons is not substantial, a jury cannot reasonably infer discriminatory intent," and the defendant's motion for summary judgment should be granted. Id.; See also, Sample v. Schuller, Inter., Inc., 836 F.Supp. 876, 880-82 (S.D.Ga. 1993) (granting defendant's motion for summary judgment because the plaintiff failed to provide sufficient summary judgment proof that the defendant's articulated reasons for his termination were pretextual); Armstrong, 997 F.2d at 65 (granting defendant's motion for summary judgment because plaintiff failed to produce sufficient summary judgment proof that the defendant's articulated reasons for her termination were pretextual); Aikens v. Banana Republic, 877 F.Supp. 1031, 1039 (N.D.Tex. 1995) (dismissing plaintiff's Title VII claim because she failed to establish a prima facie case).

An employee cannot resist a defendant's motion for summary judgment based on allegations which are supported only by his own subjective beliefs. Aikens, 877 F.Supp. at 1038 citing Little v. Republic Refining Co., 924 F.2d 93, 96 (5th Cir. 1991); Sherrod v. Sears & Roebuck Co., 785 F.2d 1312, 1316 (5th Cir. 1986); Elliott v. Group Medical & Surgical Serv., 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984); McRay v. DPC Indus., 875 F.Supp. 384, 390-91 (E.D.Tex. 1995) (granting defendant's motion for summary judgment because the plaintiff failed to submit summary judgment proof, other than conclusory statements, that he was subject to discrimination). Mere naked allegations or a mere scintilla of evidence cannot prevent the granting of summary judgment. Davis, 14 F.3d at 1087. "[T]he plaintiff must produce specific, substantial evidence of pretext to avoid summary judgment." Willis, 26 F.3d at 890; Steckl v. Motorola, Inc., 703 F.2d 392, 393 (9th Cir. 1983). The plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986); see also, Devera v. Adams, 874 F.Supp. 17, 23 (D.D.C. 1995) (dismissing plaintiff's Title VII claim and holding that the "plaintiff's experiences as a Smithsonian guard do not provide him with personal knowledge of Smithsonian hiring policy, and he has provided no evidence to support his assertion of discrimination"); Taylor v. Houston Lighting & Power Co., 756 F.Supp. 297, 301 (S.D.Tex. 1990); see also, Palucki v. Sears, Roebuck, & Co., 879 F.2d 1568, 1572 (7th Cir. 1989); Devera, 874 F.Supp. at 17 (granting summary judgment even though the plaintiff submitted deposition testimony that other officers in other companies were not discharged for disobeying the no-tag rule because the plaintiff did not claim to have personal knowledge of such disparate treatment). Further, a plaintiff does not provide sufficient summary judgment proof merely because he "thinks" or "believes" that he was terminated for discriminatory reasons. Taylor, 756 F.Supp. at 301, and a plaintiff's conclusory statement in his affidavit that "I believe that I was discriminated against because of my age . . . is insufficient summary judgment proof because a person's subjective belief that he suffered discrimination cannot alone be the basis for judicial relief." White v. Houston Indep. Sch. Dist., 815 F.Supp. 1016, 1019 (S.D.Tex. 1993). In fact, the Fifth Circuit has long recognized that mere conclusory statements by a plaintiff are insufficient to support a conclusion that an employer was more likely than not motivated by discriminatory intent. White, 815 F.Supp. at 1019; E.E.O.C. v. Exxon Shipping Co., 745 F.2d 967, 976 (5th Cir. 1984); Elliott, 714 F.2d at 564, 566-67. Finally, an employee does not establish, for purposes of summary judgment, that the disciplinary decision was discriminatory merely because the employer's decision later turns out to be incorrect; the plaintiff must show that the decision was made with a discriminatory motive. Mayberry, 55 F.3d at 1091; McDaniel v. Temple Independent School Dist., 770 F.2d 1340, 1349 (5th Cir. 1985) ("the plaintiff

has a far greater burden of proof than merely to show that the defendants's decision not to renew her contact might have been wrong because she really was a good employee. . . "). Title VII does require the employer to establish that the employee's termination was for "good cause." Wilson v. Belmont Homes, Inc., 970 F.2d 53, 57 (5th Cir. 1992). "Even an incorrect belief that an employee's performance is inadequate [or that the employee violated a work rule] constitutes a legitimate, nondiscriminatory reason" for the disciplinary action taken. Little, 924 F.2d at 97; McDaniel, 770 F.2d at 1348. Thus, "[t]he existence of competing evidence about the objective correctness of a fact underlying a defendant's proffered explanation does not in itself make reasonable an inference the defendant was not truly motivated by its proffered justification. Little, 924 F.2d at 97.

In the present case, the Plaintiff maintains that his termination on January 11, 1993 was discriminatory and in violation of Title VII and 28 U.S.C. § 1981. Plaintiff claims that his discharge was "part of a pattern of Vesuvius to open up positions for white employees who had been laid off when Vesuvius shut-down one of its divisions, i.e. 'Viso' division." Plaintiff's Response to Defendant's Motion for Summary Judgment at p. 3.

On January 8, 1993, the Plaintiff was working the 5:00 a.m. to 1:30 p.m. shift. Plaintiff was allegedly supposed to leave work at 1:30 p.m. or when the next shift arrived. Plaintiff claims that he told his direct supervisor Bell he needed to leave on time because he needed to get a flat fixed, Bell Deposition at p. 107-08, and Bell allegedly told him that it would be okay. Id. at 108; 110.

Bell, however, directly contradicts the facts as alleged by Plaintiff in an affidavit supplied to this Court. Bell, Plaintiff's African-American supervisor, claims that on January

8, 1993, he instructed Graves to help with the cleanup and storage of materials from the casting floor, as other employees had been instructed. Affidavit of Calvin Bell p.1. Graves allegedly told Bell that he had punched out his time card and was going to leave the plant. Bell again allegedly told Graves to punch in and get to work because he had not completed the work assigned. Id. Within twenty minutes of their original discussion, Bell claims that he saw Graves in the breakroom/ time clock area and that he instructed Graves to return to his work area. Id. Graves allegedly "asked me [Bell] if I was serious and I told him that I was." Id. Bell then claims that Graves walked out of the building and got into his truck. Id. Bell states that he followed Graves from the building and warned Graves that he better return to work. Id. Additionally, Jimmy Middleton, also an African-American supervisor for the Defendant, claims to have observed Bell directing Graves back to work and Graves ignoring Bell's directive.

> On January 8, 1993, shortly after 2:00 p.m., I was standing in a doorway to the plant and witnessed Calvin Bell directing employee Troy Graves back to work while Graves was walking out of the plant and getting into his truck. Graves disregarded the order to return to work, and got into his truck and left the plant.

Affidavit of Jimmy Middleton p. 1. Graves, however, did not return to work, and he left the premises.

After Graves left, Bell reported the incident to his supervisor Mark Sullivan and to the Manufacturing Manager James Johnson. After a further investigation of the incident, Bell claims that they learned Graves had not clocked out when Bell first ordered him back to work at 1:40 p.m. but had

instead waited until 2:04 p.m. after Bell had ordered him back to work several times.

On January 11, 1993, Bell, Johnson, and Sullivan met with Graves and informed him that he was being terminated for violating a work rule which required him to follow a supervisor's directive and for falsification of information on his time card. Id. Bell maintains, as does the Defendant corporation, that the decision to terminate Graves had nothing to do with his race, and the same decision would have been made had Graves been white.

Based on the summary judgment proof submitted, the Court determines that the Defendant is entitled to summary judgment. First, it does not appear that the Plaintiff has provided the Court with sufficient summary judgment proof to establish a prima facie case that his termination was discriminatory. Plaintiff has failed to provide the Court with any evidence suggesting that non-minority employees were not terminated when they failed to follow a supervisor's order to return to work. Thus, Plaintiff has failed to show that non-minorities were given different treatment under substantially similar situations. Additionally, while it is unlikely that Plaintiff could establish a prima facie case by merely contesting the fact of whether he was ordered back to work, the Court will assume arguendo that Plaintiff has established a prima facie case on this basis.

In response to Plaintiff's arguable prima facie case, the Defendant has articulated a non-discriminatory reason for Plaintiff's termination. The Defendant claims that Plaintiff was terminated because his supervisor directed him to return to work, and Plaintiff ignored his supervisor's directive and left the plant. The Defendant, therefore, has satisfied its burden of production.

Plaintiff, however, fails to establish that the above justification provided by the Defendant was a mere "pretext" or "ruse" for discrimination. The Defendant maintains that the decision to terminate Plaintiff was based on his decision to not follow the directives of his African-American supervisor (Bell) and the statements of a witness to the incident, who was incidently also an African-American supervisor (Middleton), which also supported Bell's version of the facts. Even if the above African-American supervisors were intentionally lying about whether Bell told Plaintiff to return to work, Plaintiff has failed to provide the Court with sufficient summary judgment proof that the decision to terminate his employment was because of a discriminatory animus. Terminating Plaintiff's employment for failing to follow a supervisor's directive, even if incorrect, is clearly a valid basis for terminating an employee's employment. Neither Title VII nor § 1981 require that an employer prove that an employee's termination was for "good cause" or even that their decision to terminate was correct. Title VII and § 1981 only require that the decision to terminate not have been discriminatory. Thus, the summary judgment proof submitted by the Plaintiff fails to provide the Court with sufficient proof that the Defendant's articulated reason for his termination was a pretext for discrimination.

Plaintiff seeks to "confuse" the issue in the present case by citing some "extraneous examples" of "perceived" past discrimination. For instance, Plaintiff claims that Brian West, another Vesuvius employee, left work early, but Plaintiff was not allowed to do so in this case. Bell Depo. at p. 74. The situations, however, were clearly not substantially similar; West was allegedly allowed to leave early because his wife was sick and Plaintiff requested to leave early because he wanted to fix a flat. Id. Plaintiff also complains that he suffered discrimination when he was disciplined for fighting and for carelessness. Id. at p. 43. In addition to failing to show that

these decisions to discipline Plaintiff were discriminatory, Plaintiff's reference to these incidents is unhelpful because the Defendant informed him that the decision to terminate his employment was based on his disobeying a supervisor's order not his previous work related problems.

Plaintiff also complains that the decision to not appoint him to a lead man position was discriminatory; however, he fails to provide the Court with any summary judgment proof of discrimination other than the fact that he claims the position was given to a white man with less seniority. These facts do not establish that a pattern of discrimination existed at Vesuvius. If such facts were sufficient to maintain a cause of action under Title VII, district courts would be overwhelmed with frivolous discrimination claims every time a non-minority with less seniority was promoted. Neither Title VII nor § 1981 require such an in-depth micro-management of daily business decisions by the federal judiciary. Plaintiff's other "examples of discrimination" likewise fail to provide any basis from which a reasonable jury could conclude the Plaintiff's termination was discriminatory.

In conclusion, the Court determines that the summary judgment proof in the present case is insufficient to establish that the Defendant's articulated reason for Plaintiff's termination was false and that his termination was discriminatory. As the Fifth Circuit so recently recognized in Rhodes, summary judgment should be granted when "the evidence as a whole" does not create an issue of a fact as to whether each of the employer's stated reasons for the termination is what actually motivated the employer's decision to terminate the Plaintiff's employment" or "create a reasonable inference that race played a determinative factor in the actions of which the Plaintiff complains. Rhodes, 75 F.3d at 993. The Defendant's motion for summary judgment is, therefore, granted.

C. Statue of Limitations

When a federal statute does not include a statute of limitations, federal courts apply the most appropriate limitations period provided by state law. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Dumas v. Mt. Vernon, 612 F.2d 974, 977 (5th Cir. 1980). Claims brought pursuant to § 1981 are characterized as personal injury claims, Price v. Digitala Equipment Corp., 846 F.2d 1026, 1028 (5th Cir. 1988); therefore, Texas' two year statute of limitations applies to Plaintiff's claims. National Ass'n of Governmental Employees v. City of Public Service Bd. of San Antonio, 40 F.3d 698, 713 n.22 (5th Cir. 1994).

Plaintiff alleged that his termination on January 11, 1993 was in violation of § 1981. Plaintiff, however, did not file his section 1981 lawsuit until August 22, 1995. Plaintiff's § 1981 claim is, therefore, barred by Texas two year statute of limitations. Accordingly, it is

ORDERED that Defendant Vesuvius USA's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that this case is **DISMISSED**.

SIGNED this 17th day of July, 1996.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50621

D.C. Docket No. W-95-CV-274

TROY L. GRAVES

Plaintiff - Appellant

v.

VESUVIUS USA

Defendant - Appellee

Appeal from the United States District Court for the Western District of Texas, Waco.

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY,* District Judge.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: May 29, 1997

* District Judge of the Western District of Louisiana, sitting by designation.

OP-OA-J-1

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/Latonya Grant
Deputy May 29, 1997
New Orleans, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50621

TROY L. GRAVES

Plaintiff-Appellant

versus

VESUVIUS USA

Defendant-Appellee

Appeal from the United States District Court
for the Western District of Texas
(W-95-CV-275)

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY,[1] District Judge.

PER CURIAM:[2]

Troy L. Graves appeals the district court's grant of summary judgment, dismissing plaintiff's claims pursuant to

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) and 42 U.S.C. § 1981. Troy L. Graves was discharged from his employment at Vesuvius USA on January 8, 1993. Graves subsequently filed suit on August 22, 1995, alleging that his discharge was part of pattern and practice of discrimination against him on the basis of his race and was also part of a plan by Vesuvius to open up positions for white employees who had been laid off when Vesuvius shut down one of the two divisions, i.e., its "VISO Division." (R.159-164).

Having considered the briefs, oral arguments of counsel, and finding no error on the part of the district court, this court finds that summary judgment was properly granted and therefore, we AFFIRM.

ENTERED on May 5, 1997.